Supreme Court, U.S.
FILED

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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

SRS TECHNOLOGIES, INC.

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED FOR REVIEW

1. Under the "Section 8(a)" Program, the U.S. Government awards federal contracts to minority-owned contractors without competition. There is a conflict among the Circuit Courts over the question of what is required to challenge the constitutionality of this Program. In order to establish such standing, is it enough that the Plaintiff's work has been displaced by a sole-source award under the Program, or (as the court below held) does the Plaintiff have standing only if it shows that it qualifies for participation in the Program on all grounds other than minority ownership?

PARTIES TO THE PROCEEDING

Petitioner SRS Technologies, Inc. ("SRS")[1] brought this action in the United States District Court for the Eastern District of Virginia to enjoin the performance of U. S. Government Contract No. SEA993-96-C-002 an award to a minority contractor without competition that displaced work being performed by SRS. Petitioner SRS was the only Plaintiff in the district court proceedings, was the only Appellant before the United States Court of Appeals for the Fourth Circuit, and is the only Petitioner in the present action.

Respondents are the United States Department of Defense, the United States Small Business Administration, the Defense Evaluation Support Agency, and intervenor High Technologies Solutions, Inc. ("HTS"), the minority contractor. Respondents were Defendants in the district court proceedings and Appellees before the United States Court of Appeals for the Fourth Circuit. The Minority Business Summit Volunteer Committee intervened as a Defendant in the district court proceedings, but withdrew as a party to the appeal before the Fourth Circuit.

There are no other parties to this action.

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[1] In accordance with S. Ct. R. 32(6), SRS states that it has no parent or subsidiary companies.

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No.

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

SRS TECHNOLOGIES, INC,

Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On May 6, 1997, the United States Court of Appeals for the Fourth Circuit issued its opinion in SRS Technologies, Inc. v. U.S. Dep't of Defense, No. 96-1484, slip op. (4th. Cir. May 6, 1997), affirming the decision of the United States District Court for the Eastern District of Virginia in SRS Technologies, Inc. v. U.S. Dep't of Defense, No. C/A 95-1792-A, slip op. (E.D. Va. Feb. 20, 1996). On July 1, 1997, the United States Court of Appeals for the Fourth Circuit issued its Order in the same case denying the Appellant's Petition for Rehearing. On July 9, 1997, the United States Court of Appeals for the Fourth Circuit issued its Mandate stating the judgment of the court dated May 6, 1997 would take effect on that day.

STATEMENT OF JURISDICTION

Petitioner seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit, decided on May 6, 1997. That judgment affirmed the lower court's grant of dismissal for lack of standing. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1) (1994).

A petition for writ of certiorari intended to bring any judgment in a civil action, suit or proceeding before the Court for review shall be taken within ninety days after the entry of such judgment. 28 U.S.C. § 2101(c) (1994). Rule 13 of the U.S. Supreme Court Rules states that the time to file a petition for writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed. Rule 13 of the U.S. Supreme Court Rules states that the time to file a petition for a writ of certiorari runs from the date of the denial of the petition for rehearing, which in the present case was July 1, 1997. An Order denying Appellant's Petition for Rehearing. This Petition for Writ of Certiorari is filed on time.

STATEMENT OF THE CASE

This case concerns the Government's displacement of an incumbent subcontractor by means of an illegal and improper sole-source award of a Government contract, which was in violation of the U.S. Constitution and other applicable laws. The award was made under a federal program that impermissibly discriminates on the basis of race, and precludes Petitioner SRS and other contractors who are not members of the program the opportunity to compete for the work. The particular procurement at issue is the support services contract for the Pacific Missile Range Facility ("PMRF"), a military facility in Kauai, Hawaii. The court below held that SRS has no standing to challenge the constitutionality of the program under which it was displaced, and under which it was excluded from competition.

Several years ago, the Defense Evaluation Support Activity ("DESA"), a U.S. Department of Defense ("DoD") activity, awarded Contract No. MDA970-89-C-0019 (the "Prime Contract") to TRW,

Inc. ("TRW"). For over ten years, SRS, a small business concern, provided engineering services for the Prime Contract to the U.S. Navy at PMRF, under Subcontract No. EY9655AW9S with TRW. These services included technical and analytical support to PMRF.

In July 1995, SRS discovered that DoD, through its operating agency DESA, and the U.S. Small Business Administration ("SBA") had designated High Technology Solutions, Inc. ("HTS") as an eligible minority-owned contractor under the Minority Small Business and Capital Ownership Development Program (the "8(a) Program"), 15 U.S.C. § 637(a) (1994). SRS also discovered that DoD and the SBA had decided to replace SRS's subcontract with a prime contract awarded to HTS, under Contract No. SEA993-96-C-002 (the "HTS contract"). The contract was awarded pursuant to the SBA's race-based Section 8(a) Program, discussed in detail, infra.

HTS proposed to hire away SRS's employees, as a group, to perform the HTS contract requirements, and add one HTS employee. This requirement was never offered for competitive procurement, so SRS was afforded no opportunity to compete for the HTS contract. In fact, SRS learned of the award of the HTS contract only when it had become a virtual fait accompli.

Subsequently, SRS brought this action in the United States District Court for the Eastern District of Virginia (the "district court") to enjoin DoD and DESA from permitting performance of the HTS contract.[2] The district court had jurisdiction over SRS's complaint pursuant to 28 U.S.C. § 1331 (1994), because the action arose under the United States Constitution and laws of the United States, including but not limited to the Fifth and Fourteenth Amendments to the U.S. Constitution.

SRS alleged that the award of the contract had been based on racial "disadvantage" of HTS's owner, in violation of the Fifth Amendment to the U.S. Constitution. SRS also sought a declaration that the actions

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[2] At the time of filing this action in the district court, SRS had exhausted its administrative remedies, and the start of performance of the HTS contract was imminent.

of DoD and the SBA violated the Fifth Amendment, the Fourteenth Amendment, and the Administrative Procedures Act ("APA"). In addition, SRS alleged that the award was invalid because HTS did not meet the Section 8(a) Program's two-year experience requirement, and because the SBA failed to conduct the adverse impact analysis required by 13 C.F.R. § 124.309 (1995). These last two, nonconstitutional arguments are not at issue in this petition.

SRS moved for summary judgment in the district court. The intervenor HTS, joined by Defendants, moved for dismissal on the grounds that SRS lacked standing to bring this action since SRS was not denied the contract because of its owner's race.[3] On February 20, 1996, the District Court denied SRS's motion, granted Defendant's motion to dismiss, and dismissed the action.[4] SRS appealed to the U.S. Court of Appeals for the Fourth Circuit on April 19, 1996. The appeal was filed on time under 28 U.S.C. § 2107 (1994) and Fed. R. App. P. 4(a) (1). SRS maintains that it has standing by virtue of losing millions of dollars in revenue to a sole-source contract awarded on the basis of race, and whether SRS would qualify for the sole-source program itself is entirely irrelevant. The Fourth Circuit had jurisdiction under 28 U.S.C. § 1291 (1994), since the district court's judgment was final and dismissed all of SRS's claims with prejudice. The Fourth Circuit, in an

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[3] The Defendants relied on Dynalantic Corp. v. U.S. Dep't of Defense, 937 F. Supp. 1 (D.D.C. 1996) in support of their argument that contractors have no standing to raise an equal protection challenge to the Section 8(a) Program if they are ineligible for the program for any reason other than the Government's alleged use of race-based criteria. In fact, the Defendants attached a copy of that opinion to their brief in the Fourth Circuit. This decision, however, was reversed by Dynalantic Corp. v. U.S. Dep't of Defense, 115 F.3d 1012 (D.C. Cir. 1997) which is the principal case addressed in this petition, infra.

[4] Incredibly, the district court ruled that SRS had no standing because its owner "is a native of India," and therefore "Plaintiff is an intended beneficiary, not a victim, of the racial classification it challenges." App. at 9a. In other words, the court ruled that a company may challenge injury to it for the benefit of minorities only if it is owned by white people, and the courthouse doors are closed to all others.

unpublished decision issued on May 6, 1997, affirmed the district court's judgment.

The Fourth Circuit held, inter alia, that SRS lacked standing to raise its constitutional claims because it failed to show an injury in fact and a causal connection between the injury and the conduct of which it complained. In Section II of the Fourth Circuit's opinion, the relevant section, the court held that SRS lacked standing because it "was not prohibited from participating in the 8(a) Program for race-based reasons. Rather, SRS was ineligible to participate in the 8(a) Program because its owner is a multi-millionaire whose net worth exceeded SBA's guidelines for economic disadvantage by several orders of magnitude." App. at 4a.[5] Petitioner now seeks the review of this Court.

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[5] The Fourth Circuit did not rule against SRS's standing on the constitutional issues because SRS was a subcontractor, it had a task order contract, it had not submitted an actual written proposal to continue its work, it needed TRW's cooperation to submit such a proposal, or any of the other reasons argued by the Defendants.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING WHETHER A COMPANY WHICH IS NOT IN THE SECTION 8(a) PROGRAM (FOR WHATEVER REASONS) HAS STANDING TO CHALLENGE THE CONSTITUTIONALITY OF A GOVERNMENT DECISION TO AWARD A FEDERAL CONTRACT DISPLACING IT TO A CONTRACTOR IN THE SECTION 8(A) PROGRAM.

The Small Business Act, 15 U.S.C. § 631 et seq. (1994 & Supp. 1996) (the "Act"), declares it to be "the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, . . . shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency." Id. § 637(d)(1) (1994 & Supp. 1996). The Act sets a "Government-wide goal" that not less than five percent of the total value of all prime contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged small business concerns. Id. § 644(g)(1) (1994). The SBA is authorized to contract with other government agencies to provide goods and services. Id. § 637(a) (1994). The SBA then subcontracts that work to a minority-owned qualifying business, often (as here) without competition. Id.

A "qualifying business" is one that is small, as defined by statute, and 51% owned and controlled by individuals who are both "socially and economically disadvantaged." Id. § 637(a)(4)(A) & (B) (1994). Socially disadvantaged individuals are those who have "been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." Id. § 637(a)(5) (1994). An economically disadvantaged individual is a socially disadvantaged individual "whose ability to compete in the free enterprise system has been impaired due to diminished capital and

credit opportunities." Id. § 637(a)(6)(A) (1994).[6] The SBA selects program participants.

This statute and the implementing regulations include a presumption that small businesses owned and controlled by certain racial minorities are "socially disadvantaged" persons for purposes of the Section 8(a) Program and the Act.[7] Virtually all of the participants in the Section 8(a) Program are minority-owned. SRS argued to the lower court that the issuance of the HTS contract without competition on the alleged economic and racial disadvantage of the SBA's chosen contractor, HTS, was in violation of the U.S. Constitution. SRS had standing to raise these issues.

To have constitutional standing, a plaintiff must be able to prove all three of the following: (1) that it suffered an "injury in fact"; (2) that there is a causal connection between the injury and the conduct complained of; and (3) that it must be likely that the injury will be redressed by a favorable decision of the court. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). A plaintiff must also prove that he falls within the "zone of interests" to be protected or regulated by a statute or constitutional provision. Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970). A court has no jurisdiction to consider the merits of a plaintiff's claims if the plaintiff does not have standing. See Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 255 (1994) (standing is jurisdictional).

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[6] Under the implementing regulations, individuals with a personal net worth exceeding $250,000 cannot initially qualify as economically disadvantaged. 13 C.F.R. § 124.106(a)(2)(*i*) (1997). An individual whose net worth exceeds $750,000 is not eligible for continued participation in the 8(a) Program. Id. § 124.111(a)(2) (1997).

[7] There is another preference program called the "SDB Program," for "small disadvantage businesses." In this Program, the would-be contractor self-certifies, rather than being selected by the SBA. SRS qualified as a small disadvantaged business until September 1993. The SBA then discontinued SRS's eligibility because the SBA concluded that SRS's owner was no longer "economically disadvantaged."

Both the district court and the Fourth Circuit held that the Petitioner SRS lacked standing to challenge the Government's award of the PMRF contract to HTS on the basis of race in violation of the Constitution's guarantee of equal protection, for the reasons stated above.

This holding is directly opposite to that of the U.S. Court of Appeals for the District of Columbia Circuit's holding one month later in Dynalantic Corp. v. Dep't of Defense, 115 F.3d 1012 (D.C. Cir. 1997). In Dynalantic Corp., Dynalantic sued DoD and the SBA to enjoin a Section 8(a) set-aside procurement of a flight simulator contract for which Dynalantic wished to compete. The district court in that case held that Dynalantic did not have standing because Dynalantic, like SRS, did not qualify for the Section 8(a) Program for reasons other than the race of its owners. On appeal, however, the D.C. Circuit wisely reversed.

Dynalantic, like the Petitioner SRS, could not claim to be "economically disadvantaged" under the Act. The D.C. Circuit stated that this

> argument is premised on a mischaracterization of Dynalantic's alleged injury. Appellant has no desire to participate in the 8(a) program. [Citation omitted]. Rather Dynalantic's injury is its lack of opportunity to compete for Defense Department contracts reserved to 8(a) firms.

Dynalantic Corp., 115 F.3d at 1016 (emphasis added). Unlike the Fourth Circuit, the D.C. Circuit acknowledged the real injury in fact -- the lack of an opportunity to compete for a federal contract.

The D.C. Circuit also rejected a similar argument that Dynalantic was not an "appropriate" plaintiff to bring a case concerning the constitutionality of the Section 8(a) Program; rather, according to the Civil Rights Division of the Justice Department, a "poor white contractor would be." Id. The D.C. Circuit held that "Dynalantic, as we have noted, does not seek to qualify for the 8(a) program, so whether it could meet the non-race-conscious requirements is wholly

irrelevant." Id.; contra SRS Technologies, Inc., app. at 3a-4a (Fourth Circuit held that SRS had no standing to challenge the race-conscious criteria of the Section 8(a) Program because it did not meet a non-race-conscious criterion of the Section 8(a) Program). Thus, a plaintiff's standing to challenge the award of a federal contract to a Section 8(a) company is **not** contingent upon the plaintiff's economic classification (or "race-neutral" or "non-race-conscious" criteria).

Dynalantic asserted, like Petitioner SRS in the present case, that it was ready and able to bid on the contract and future contracts but that a discriminatory policy prevented it from doing so on an equal basis. The D.C. Circuit agreed with Dynalantic and held that it was unnecessary for Dynalantic to "demonstrate that it actually would have won (or will win) the award of a particular contract." Id. (citing to Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995)).[8]

In summary, the District of Columbia Circuit stated:

> the interdependency of various provisions of the Act and the 8(a) regulatory scheme demonstrates that Dynalantic's injury -- its inability to compete on equal footing with 8(a) participants -- is traceable to the 8(a) program and is likely to be redressed by a decision holding all or part of the program unconstitutional. Dynalantic thus has standing to challenge the constitutionality of the 8(a) program, and the judgment of the district court is reversed.

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[8] The argument of whether SRS was "likely" to receive a contract was not addressed by the Fourth Circuit in its SRS Technologies decision with respect to the constitutional claims. The district court, however, addressed this argument and held that SRS's chance of obtaining a contract was remote, even though SRS was the incumbent. As the D.C. Circuit correctly held in Dynalantic Corp., the true test is whether the contractor is ready, willing and able to compete for the contract and then denied the opportunity to compete because of a discriminatory policy. It is this denial of the opportunity which causes the injury in fact. Whether or not the contractor would likely win the award is not relevant to the issue of injury in fact and hence, standing.

Dynalantic Corp., 115 F.3d at 1018 (emphasis added). The District of Columbia Circuit rightly concluded that Dynalantic had constitutional standing to pursue the action. In doing so, it found that Dynalantic met all three of the constitutional standing requirements -- an "injury in fact," a causal connection between the injury and conduct of which it complained, and that the injury would likely be redressed by a favorable decision of the court. Lujan, supra.

Although the relevant facts of the present case concerning Petitioner SRS and Dynalantic Corp. are the same, two opposite conclusions were reached. The Fourth Circuit denied the Petitioner SRS its day in court, while the District of Columbia Circuit correctly ruled on the issue of standing.

CONCLUSION

In both Dynalantic Corp. and the present case, the Plaintiffs asserted that they were denied an opportunity (and future opportunities)[9] to compete for a contract because of a racial preference program which violates the U.S. Constitution. Yet, in the present case the Fourth Circuit ruled the Plaintiff, Petitioner SRS, had no standing to raise such constitutional issues, whereas in Dynalantic Corp. the D.C. Circuit held the Plaintiff did have standing to raise such constitutional issues. The circuits are split as to this issue. As the litigation in this area grows, more divergent views from the circuits will inevitably arise unless the U.S. Supreme Court resolves the issue. Given the Government's presence in all Circuits, and flexible venue rules regarding where the Government may be sued, the Fourth Circuit should feel secure that litigants will avoid it when this issue arises and the D.C. Circuit should prepare for an onslaught of litigation.

To prevent this, however, and to avoid further confusion on the issue, this Court should grant certiorari to resolve the conflict concerning standing of a non-Section 8(a) company to challenge the constitutionality of an award of a federal contract without competition to a Section 8(a) company.

Respectfully submitted,

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[9] The D. C. Circuit also ruled that future use of the Section 8(a) Program would impact Dynalantic since it was likely the Government "will, sometime in the near future, attempt to procure under the 8(a) Program another contract which Dynalantic was ready, willing and able to bid." Dynalantic Corp., 115 F.3d at 1018.

APPENDIX A-UNPUBLISHED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 96-1484

SRS TECHNOLOGIES, INCORPORATED,

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF DEFENSE, WILLIAM PERRY, SECRETARY, DEPARTMENT OF DEFENSE; SMALL BUSINESS ADMINISTRATION; THE DEFENSE EVALUATION SUPPORT AGENCY; HIGH TECHNOLOGY SOLUTIONS, INCORPORATED,

Defendants-Appellees,

and

THE MINORITY BUSINESS SUMMIT VOLUNTEER COMMITTEE,

Defendants.

April 10, 1997, Argued
May 6, 1997, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria (CA-95-1792-A)

DISPOSITION: Affirmed by unpublished per curiam opinion.

COUNSEL: Alan Mark Grayson, McLean, Virginia, for Appellant.

Appendix A

Gregory Bryan Friel, United States Department of Justice, Washington, D.C., for Appellees. On brief: James S. DelSordo, McLean, Virginia, for Appellant. Deval L. Patrick, Assistant Attorney General, Denis J. Dimsey, United States Department of Justice, Washington, D.C., for Federal Appellees; Nancy O. Dix, Mary A. Lehman, Gray, Cary, Ware & Freidenrich, San Diego, CA; Karla L. Palmer, Michael R. Charness, McDermott, Will & Emery, Washington, D.C., for Appellee High Technology Solutions.

BEFORE: Wilkinson, Chief Judge, and Hamilton and Motz, Circuit Judges.

OPINION

PER CURIAM:

SRS Technologies brought suit challenging the government's award of a technical support services contract to High Technology Solutions pursuant to the Small Business Administration's (SBA) 8(a) Program. SRS claims that the 8(a) Program is unconstitutional because it uses racial presumptions to determine "social disadvantage." SRS further alleges that SBA violated its own procurement regulations. The district court found that SRS lacked standing to raise these claims, and SRS appealed. We affirm the judgment.

I.

SRS Technologies provides technical support services to TRW, Inc. pursuant to a nationwide subcontracting agreement. TRW, in turn, services military facilities under an omnibus contract with the Defense Evaluation and Support Agency, a component of the Department of Defense. One of the sites where SRS formerly provided services to TRW is the Pacific Missile Range Facility (PMRF) in Kauai, Hawaii.

In 1995, the government announced that it would no longer use the TRW contract for work at the PMRF. As a result, SRS ceased performing services for TRW at the PMRF on December 31, 1995.

Appendix A

The government awarded the PMRF work to High Technology Solutions (HTS) through a program established under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a).

Under the 8(a) Program, the Small Business Administration (SBA) enters into contracts with other government agencies to provide goods or services. SBA then subcontracts the work to small businesses that are owned and controlled by "socially and economically disadvantaged" individuals. SBA's regulations establish a rebuttable presumption that members of a certain racial or ethnic groups are socially disadvantaged for the purposes of the 8(a) Program. 13 C.F.R. § 124.105((b)(1). HTS's owner is a Philippine descent, and SRS's owner is a native of India. Both derive from ethnic groups that are presumed disadvantaged.

Regardless of the presumption of social disadvantage, SBA requires each 8(a) Program participant to make an individualized showing of economic disadvantage. SBA's regulations provide that "an individual whose personal net worth exceeds $250,000 will not be considered economically disadvantaged for purposes of 8(a) program entry." 13 C.F.R. § 124.106(a)(2)(i). SRS cannot participate in the 8(a) Program because SRS's owner is a multi-millionaire.

On December 28, 1995, SRS filed a complaint alleging that the government awarded the PMRF contract to HTS on the basis of race in violation of the Constitution's guarantee of equal protection. SRS further alleged non-constitutional claims related to the award of the PMRF contract to HTS The district court dismissed the suit, finding that SRS lacked standing to raise any of its claims. SRS appeals.

II.

In order to show standing to raise its constitutional claim, SRS must demonstrate a "causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555,560 (1992). SRS challenges the racial presumptions of social disadvantage in SBA regulations implementing section 8(a) of the

Small Business Act. However, SRS was not prohibited from participating in the 8(a) Program for race-based reasons. Rather, SRS was ineligible to participate in the 8(a) Program because its owner is a multi-millionaire whose net work exceeded SBA's guidelines for economic disadvantage by several orders of magnitude. SBA's requirement of economic disadvantage for entry into the 8(a) Program is a race-neutral criterion. It was by virtue of this race-neutral criterion that plaintiff failed to qualify for a contract award, and is standing to challenge the race-conscious criteria is therefore lacking.

III.

SRS also raises non-constitutional claims regarding the government's award of the PMRF contract to HTS. First, SRS complains that HTS was not qualified to participate in the 8(a) Program because it had not fulfilled SBA's two-year experience requirement, as generally required by 13 C.F.R. § 124.107. However, even if HTS were not qualified, this would not affect SRS. Regardless of HTS's qualifications, SRS would still have been unable to participate in the 8(a) Program because of its owner is not economically disadvantaged.

Furthermore, even assuming that the government would open the PMRF contract to all bidders if HTS were disqualified, SRS would still lack standing. SRS's contract with TRW prohibits SRS from entering into other contracts which involve tasks that are directly related to work that SRS has performed under the TRW subcontract unless TRW grants a waiver. If the contract were open to competitive bidding, it is not certain that such a waiver would be forthcoming, as TRW might well desire to bid on the contract itself. Since SRS's ability to compete for the PMRF contract in this situation would depend on the "independent action of some third party not before the court," SRS cannot establish standing. *Lujan*, 504 U.S. at 560 (citation omitted).

SRS further alleges that the government violated 13 C.F.R. § 124.309 by failing to perform an adverse impact study before assigning the PMRF contract under the 8(a) Program. That regulation, however, is designed to protect small businesses who have contracts

with the government. SRS did not have a contractual relationship with the government at the time the PMRF work was contracted to HTS. Rather, SRS was performing a contract for TRW. As such, SRS was not a party protected by section 124.309 and has no standing to raise a claim under that regulation. *See GBA Associates v. General Services Administration*, 32. F.3d 898, 900 (4th Cir. 1994) (party must be within a statute's zone of interest to establish standing).

IV.

For the foregoing reasons we affirm the judgment of the district court.

AFFIRMED.

APPENDIX B-MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, FILED FEBRUARY 20, 1996

No. C/A 95-1792-A

SRS TECHNOLOGIES, INC.,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF DEFENSE, et. al.,

Defendants.

BEFORE: Claude M. Hilton, United States District Judge

MEMORANDUM OPINION

This matter came before the Court on plaintiff SRS Technologies, Inc.'s ("SRS") motion for summary judgment, and on intervenor-defendant High Technology Systems, Inc.'s ("HTS") motion to dismiss. The Court exercises federal question jurisdiction over this action. SRS, a California corporation, provides technical support services for various contracts to TRW, Inc., pursuant to a nationwide subcontracting agreement. TRW, in turn, services several military facilities under an omnibus contract with the Defense Evaluation Support Agency ("DESA"), a component of the Department of Defense ("DoD"). Under the omnibus contract, DESA may perform tasks itself, assign them to TRW, or contract with third parties directly.

One of the sites where SRS formerly provided services to TRW is the Pacific Missile Range Facility ("PMRF") in Kauai, Hawaii. The PMRF is used by the United States and several U.S. allies to develop missile weapons systems. The scope of work covered by SRS' subcontract included "technical and analytical support" to TRW,

including software development, computer operation, and data analysis. Plaintiff provided these services at the PMRF from September 1990 until October 1993, and again from November 1993 to December 31, 1995.

In 1994, DoD ordered the PMRF to reduce its operating expenses. PMRF determined that it could save approximately $200,000 in overhead costs through direct contracting instead of using the TRW omnibus contract. In the spring of 1995, PMRF announced that it would no longer utilize the TRW contract for support services. SRS was notified of the change, and was given an opportunity to propose a new direct arrangement with the PMRF. However, SRS could not guarantee continued performance, and its suggestions were unacceptable to PMRF officials.

In November 1995, DESA awarded a direct contract[1] to HTS for subtask work at the PMRF. SRS' subcontract was to expire on September 30, 1995, but was extended to December 31, 1995 to allow for transition of work to HTS. The HTS direct contract overlaps with the work plaintiff had been doing as a subcontractor. However, the HTS contract is broader in scope.

SRS brought this action to challenge the program under which HTS secured the contract. The direct contract was awarded pursuant to the Small Business Administration's ("SBA") 8(a) program, created under the Small Business Act, 15 U.S.C. § 637(a). The program is designed to benefit small businesses controlled by "socially and economically disadvantaged" individuals[2]. Social disadvantage, the first requirement for 8(a) eligibility, is presumed if an individual is a member of a certain racial groups. 13 C.F.R. § 124,195(b). HTS'

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[1] The contract is designated SEA 993-96-C-0002

[2] If the owner meets this description, the business is classified as a Small Disadvantaged Business ("SDB").

owner is of Philippine descent, and SRS' owner is a native of India. Both derive from ethnic groups that are presumed disadvantaged. An individual may also qualify by providing evidence of social disadvantage due to "gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause". 13 C.F.R. § 124.105(c)(1)(i). The second requirement, economic disadvantage, prevents individuals with a net worth of $250,000 or more from entering the program. Also, an 8(a) participant whose net worth reaches $750,000 must leave the program. 13 C.F.R. §§ 125.106(a)(2)(i), 124.111(a)(2)(ii).

Plaintiff alleges that the 8(a) program violates its right to equal protection of the laws under the Fifth and Fourteenth Amendments to the U.S. Constitution. SRS argues that since the 8(a) program awards federal contracts on the basis of race, it is constitutional only if it survives strict scrutiny review. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). SRS argues that the program is not narrowly tailored, since it does not purport to correct discrimination in the specific area of defense contracting. Therefore, 8(a) cannot survive strict scrutiny and should be struck down. SRS argues that but for this unconstitutional program, it would still be on the job in Kauai.

The plaintiff also alleges that DESA improperly applied 8(a) in awarding the contract to HTS. The program applies to new contract awards, and should not be used to deprive current contractors of work. Finally, plaintiff alleges that DESA's selection of HTS was arbitrary, and seeks to have the decision reviewed under the Administrative Procurement Act, 5 U.S.C. § 706(2)(A) ("APA").

In its motion to dismiss, HTS argues that plaintiff lacks standing to challenge the 8(a) program, since SRS was not denied the contract because of race. Rather, the plaintiff is disqualified from 8(a) participation because it is not economically disadvantaged. SRS qualified as an SDB until September 1993. At that point, plaintiff's SDB status was challenged by a competition. The Small Business Administration ("SBA") determined that the net asset worth of SRS'

owner exceeded $4 million, and therefore his company was not economically disadvantaged. The SBA's decision was upheld in SRS Technologies v. U.S., 894 F. Supp. 8 (D.D.C. 1995). The barrier to plaintiff's participation was purely economic. Therefore, HTS argues, SRS cannot challenge the constitutionality of the racial aspects of 8(a).

HTS also argues that SRS lacks standing because it has not alleged an injury in fact. SRS is under contract with TRW only. DESA was free to assign the work at PMRF to whomever it wished, or do it itself. Therefore, the only alleged injury is the disappointed hope that DESA would choose to assign the subtask to TRW, who would then pass it down to plaintiff. This, defendant concludes, is not an injury in fact sufficient to convey standing.

The Court finds that SRS lacks standing to challenge the constitutionality or administration of the 8(a) program. The constitutional challenge to the program is framed in terms of race. Race, however, had nothing to do with SRS' failure to win this contract. SRS' owner, Mohindar Sandhu, is presumed to be "socially disadvantaged" because he is a native of India. Far from being a barrier, Mr. Sandhu's ethnic background guaranteed SRS a chance to compete for 8(a) contracts. Plaintiff is an intended beneficiary, not a victim, of the racial classification it challenges. The obstacle is simply that Mr. Sandhu is too wealthy for SRS to count as an economically disadvantaged business. SRS' enviable problem is its substantial revenues. Plaintiff therefore lacks standing to challenge the constitutionality of the racial classifications in the 8(a) program.

Moreover, a plaintiff must show actual injury to have standing. Here, plaintiff has not shown any injury in fact, which would be the invasion of a legally protected interest. Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992). SRS had not vested right to continue its work at the PMRF. There was never any contract between plaintiff and

DoD[3]. At most, SRS had an expectation that it would continue on as it had in the past. This type of injury is too speculative to convey standing. When a minority set-aside is challenged, a plaintiff has shown injury in fact when it "demonstrates that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so". Northeastern Florida Contractors v. Jacksonville, 113 S. Ct. 2297, 2303 (1993). Again, the 8(a) program's discrimination in favor of racial minorities did not prevent SRS from securing this contract. No injury in fact exists.

Finally, plaintiff has no standing to challenge the award under the APA. SRS was not a bidder for this contract, nor could it have been. As a result, SRS cannot challenge HTS' qualifications or the manner in which the contract was awarded. For the reasons stated above, the motion to dismiss should be granted. An appropriate Order shall issue.

s/Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
February 20, 1996

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[3] For this same reason, plaintiff's argument that 8(a) was improperly applied fails. HTS did not dislodge a current contractor. As already noted, plaintiff was not working under a contract with DoD and was not dislodged from any vested right.

APPENDIX C-ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED JULY 1, 1997

No. 96-1484 94-cv01477

SRS TECHNOLOGIES, INCORPORATED

Plaintiff-Appellant,

v.

U.S. DEPARTMENT OF DEFENSE, William Perry, Secretary,Department of Defense; SMALL BUSINESS ADMINISTRATION; THE DEFENSE EVALUATION SUPPORT AGENCY; HIGH TECHNOLOGY SOLUTIONS, INCORPORATED

Defendants-Appellees

and

THE MINORITY BUSINESS SUMMIT VOLUNTEER COMMITTEE

Defendant

BEFORE: Wilkinson, Chief Judge, and Hamilton and Motz, Circuit Judges

ORDER

Appellant has filed a petition for rehearing. The Court denies the petition for rehearing.

FOR THE COURT,

s/ Patricia S. Connor
Clerk

APPENDIX D-MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED JULY 9, 1997

No. 96-1484 CA-95-1792-A

SRS TECHNOLOGIES

v.

DOD

MANDATE

The judgment of this Court dated 5/6/97 takes effect today.

Patricia S. Connor
Clerk

(2)

Supreme Court, U.S.
FILED
OCT 29 1997
CLERK

No. 97-564

In The

Supreme Court of the United States

October Term, 1996

SRS TECHNOLOGIES, INC.,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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388

STATEMENT PURSUANT TO RULE 29.6

Respondent High Technology Solutions, Inc. states it has neither parent companies nor nonwholly owned subsidiaries.

This is an action by Petitioner SRS Technologies, Inc. ("SRS") contesting an award of a government contract to Respondent High Technology Solutions, Inc. ("HTS") under the Small Business Administration's ("SBA") "8(a) program." This program, authorized by section 8(a) of the Small Business Act (15 U.S.C. § 637(a)), allows the SBA to give government contracts to small businesses owned and controlled by socially and economically disadvantaged individuals. Both SRS and HTS are owned and controlled by individuals whose race entitles their businesses to a presumption of social disadvantage under the 8(a) program. SRS claims that presumption is unconstitutional.

SRS' complaint was initially filed against Respondents the United States Department of Defense, William Perry, Secretary, Department of Defense, the Small Business Administration, and the Defense Evaluation Support Agency. Respondent HTS, who had begun performing the contested contract when SRS filed its lawsuit, intervened.

The district court granted a temporary restraining order enjoining HTS from work on the contested contract. The district court later denied SRS' request for a preliminary injunction and HTS was allowed to continue performance on the contested contract. That contract has since been completed.

Both HTS and the government respondents moved to dismiss SRS' complaint in the district court on the grounds SRS lacked standing to challenge the race-based presumption in the 8(a) program. The court granted the motion and dismissed. The Fourth Circuit affirmed in an unpublished opinion.

SRS now requests this Court grant certiorari solely on the basis of an alleged conflict between the unpublished opinion in this case and the recent decision in *Dynalantic Corp. v. Dept. of Defense*, 115 F.3d 1012 (D.C. Cir. 1997). In the *Dynalantic* case,

the District of Columbia Circuit held a plaintiff that did not qualify for any aspect of the 8(a) program had standing to contest that program's race preference provisions. The District of Columbia's decision is readily distinguishable from the opinion in this case because the plaintiff in *Dynalantic* was not a minority-owned business entitled to preference under the 8(a) program. Standing must be established by a "causal connection between the injury and the conduct complained of." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because SRS is a minority-owned business subject to the very preference about which it complains, the Fourth Circuit correctly held SRS has no standing to contest that preference. SRS' basis for petitioning for certiorari fails and, accordingly, the petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
NOV 28 1997
CLERK

No. 97-564

In the Supreme Court of the United States

OCTOBER TERM, 1997

SRS TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner has standing to raise an equal protection challenge to the Small Business Administration's use of racial presumptions as a factor in determining eligibility for a business development contract allocation program for disadvantaged persons where petitioner was precluded from participating in the program based on race-neutral criteria, and was neither ready nor able to compete for the contract at issue in any event.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-564

SRS TECHNOLOGIES, INC., PETITIONER

v.

UNITED STATES DEPARTMENT OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is unpublished, but the judgment is noted at 112 F.3d 510 (Table). The district court's opinion (Pet. App. 6a-10a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1997. A petition for rehearing was denied on July 1, 1997. Pet. App. 11a. The petition for a writ of certiorari was filed on September 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 8(a) of the Small Business Act, 15 U.S.C. 637(a), authorizes the Small Business Administration (SBA) to create a program to assist small businesses that are owned and controlled by "socially and economically disadvantaged" individuals. 15 U.S.C. 637(a). The statute defines "[s]ocially disadvantaged" individuals as persons who have been "subjected to racial or ethnic prejudice or cultural bias because of their identities as a member of a group without regard to their individual qualities." 15 U.S.C. 637(a)(5).

Pursuant to this statute, SBA created the "8(a) program" to help small businesses overcome obstacles that have impaired their ability to compete on an otherwise level playing field. 15 U.S.C. 637(a)(6)(A); 13 C.F.R. 124.1(a). One of the ways the program accomplishes that objective is by helping participants obtain government contracts. Under the 8(a) program, SBA enters into contracts with other government agencies to provide goods or services, and then subcontracts the work to small businesses that are owned and controlled by "socially and economically disadvantaged" individuals.

SBA regulations specify that, to participate in the 8(a) program, individuals must show that they are both "socially" and "economically" disadvantaged. For members of certain designated racial and ethnic groups, SBA regulations create a presumption of "socia[l] disadvantag[e]" for purposes of the 8(a) program. 13 C.F.R. 124.105(b)(1). Individuals who are not members of the designated groups may nonetheless qualify by producing evidence that they per-

sonally have suffered social disadvantage. 13 C.F.R. 124.105(c).

Social disadvantage alone does not qualify an individual to participate, however. Each participant must make an individualized showing of "economic" disadvantage as well. 13 C.F.R. 124.106(a). See *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 207, 238 (1995). SBA regulations provide purely financial criteria for determining economic disadvantage, and establish that "an individual whose personal net worth exceeds $250,000 will not be considered economically disadvantaged for purposes of 8(a) program entry." 13 C.F.R. 124.106(a)(2)(i).

Petitioner SRS Technologies, Inc., is owned by a native of India and was therefore presumed to be "socially disadvantaged" for purposes of the 8(a) program. Pet. App. 3a, 8a, 9a; 13 C.F.R. 124.105(b). Petitioner, however, failed to qualify for the program because its owner is not "economically disadvantaged." 13 C.F.R. 124.106(a)(2)(i). To the contrary, he is a multi-millionaire. Pet. App. 3a-4a, 8a-9a.

2. This case arises out of SBA's allocation of a contract for work at the Pacific Missile Range Facility in Kauai, Hawaii, through the 8(a) program. In the past, a company called TRW had provided technical support services to military facilities throughout the United States under an omnibus contract with the Defense Evaluation and Support Agency (DESA), a component of the Department of Defense (DoD). Pet. App. 2a, 6a. Under the contract, TRW provided services at the Pacific Missile Range Facility as well as many others. Pet. App. 2a, 6a. Petitioner, a subcontractor with TRW, periodically provided technical support to TRW on military projects nationwide, and occasionally—twice by the end

of 1995—received Pacific Missile Range Facility assignments from TRW. *Id.* at 2a-3a, 6a-7a.

Nothing in the omnibus contract between DESA and TRW required DESA to send Pacific Missile Range Facility work to TRW. Instead, DESA had the option of performing the work itself using government employees or awarding the project to a contractor other than TRW. Pet. App. 9a. Similarly, nothing in the contract between TRW and petitioner required TRW to assign its Pacific Missile Range Facility work to petitioner. Rather, TRW could perform the work itself or pass it to subcontractors like petitioner. *Id.* at 5a, 9a-10a.

In order to cut costs, DoD decided in 1995 that it would no longer use the omnibus contract with TRW for work at the Pacific Missile Range Facility. Pet. App. 2a, 7a. DoD determined that it could save approximately $200,000 in overhead expenses by contracting directly for such services instead. *Id.* at 7a. Once it learned of DoD's decision, petitioner expressed interest in contracting directly with the government to perform the Pacific Missile Range Facility work, but never came forward with an acceptable proposal. *Ibid.*

Moreover, petitioner was ineligible to compete for such a contract unless TRW agreed to waive a conflict-of-interest clause in petitioner's TRW subcontract. Pet. App. 4a. That clause prohibited petitioner from entering into other contracts that involved tasks that were directly related to the work that petitioner performed under its contract with TRW, unless TRW granted a waiver. *Ibid.* Petitioner has not alleged that TRW agreed to such a waiver with regard to Pacific Missile Range Facility work. See *ibid.*

In November 1995, the government awarded the Pacific Missile Range Facility contract to High Technology Solutions, Inc. (HTS) through the 8(a) program. HTS's owner is of Philippine ancestry and thus, like petitioner's owner (a native of India), is presumed to be "socially disadvantaged" for purposes of the 8(a) program. See 13 C.F.R. 124.105(b). Unlike petitioner's owner, however, HTS's owner also was able to meet the economic disadvantage requirement. Gov't C.A. Br. 13.

3. Petitioner filed suit challenging the award of the contract to HTS. Pet. App. 2a. Specifically, petitioner claimed that the 8(a) program's use of a race-based presumption to determine social disadvantage violates the equal protection guarantees of the Constitution. *Id.* at 2a, 3a-4a, 8a. Petitioner also raised non-constitutional challenges to the contract award, arguing that the government failed to comply with its own regulations or with the Administrative Procedure Act. *Id.* at 2a, 3a, 4a-5a, 8a, 10a.

The district court dismissed petitioner's lawsuit. Pet. App. 3a, 9a-10a. Finding that race "had nothing to do with [petitioner's] failure to win th[e] contract," the court held that petitioner lacks standing to raise an equal protection challenge to SBA's use of racial criteria as a factor in determining 8(a) program eligibility. *Id.* at 9a. Petitioner, the district court pointed out, is "an intended beneficiary, not a victim, of the racial classification it challenges" since its owner belongs to a racial group presumed to be "socially disadvantaged" for 8(a) program purposes. *Ibid.* In addition, the court explained, petitioner is ineligible for the 8(a) program because a race-neutral fact—the wealth of its owner—precluded petitioner from qualifying as "economically disadvantaged."

Ibid. Finally, even if HTS had not received the contract award under the 8(a) program, the possibility that petitioner would have been eligible to perform the work at the Pacific Missile Range Facility was simply too remote and speculative to support a claim of actual injury. *Id.* at 9a-10a. The district court also held that petitioner lacks standing to raise its non-constitutional claims. *Id.* at 10a.

4. In an unpublished opinion, the court of appeals affirmed. Pet. App. 1a-5a. The court read petitioner's equal protection claim as challenging only the use, in SBA regulations, of "racial presumptions to determine 'social disadvantage'" for purposes of entry into the 8(a) program. *Id.* at 2a; accord *id.* at 3a-4a (petitioner challenges "the racial presumptions of social disadvantage in SBA regulations implementing section 8(a) of the Small Business Act"). The court then concluded that petitioner lacks standing to raise that claim because it failed to "demonstrate a 'causal connection between the injury and the conduct complained of.'" *Id.* at 3a (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). In particular, the court explained, petitioner "was not prohibited from participating in the 8(a) Program for race-based reasons," but rather "was ineligible to participate * * * because its owner is a multi-millionaire whose net worth exceeded SBA's guidelines for economic disadvantage by several orders of magnitude." *Id.* at 4a.

The court also held that petitioner lacks standing to raise its non-constitutional claims because petitioner would have been ineligible to compete for the Pacific Missile Range Facility contract even if SBA had not reserved that contract for disadvantaged persons under the 8(a) program. Pet. App. 4a-

5a. In particular, the court explained, the conflict-of-interest clause in petitioner's contract with TRW barred petitioner from competing for Pacific Missile Range Facility work absent a waiver from TRW. The court of appeals concluded that petitioner "cannot establish standing" because its "ability to compete for the [Pacific Missile Range Facility] contract in this situation would depend on the 'independent action of some third party not before the court.'" *Id.* at 4a (quoting *Lujan*, 504 U.S. at 560).

5. Petitioner filed a petition for rehearing. The petition did not address petitioner's standing to raise its equal protection claim. Instead, it addressed only the court of appeals' holding that petitioner lacks standing to allege a violation of 13 C.F.R. 124.309. Rehearing Pet. 2. The government violated Section 124.309, petitioner alleged, by failing to analyze the impact, on other small businesses, of awarding the Pacific Missile Range Facility contract to HTS under the 8(a) program. *Ibid.* The court of appeals denied the petition. Pet. App. 11a.

ARGUMENT

The court of appeals correctly held—and petitioner does not dispute—that petitioner lacks standing to challenge the use, in SBA *regulations*, of a race-based presumption to determine "social disadvantage" for purposes of the 8(a) program. To the contrary, petitioner appears to concede that, because the use of race-conscious criteria in SBA regulations did not affect petitioner's eligibility for the 8(a) program—and a change to eliminate its race-consciousness would not render him eligible—both proof of causation and redressability are lacking.

Instead, petitioner asks the Court to decide a question that neither the district court nor the court of appeals addressed: whether petitioner has standing to challenge the *statute* authorizing the 8(a) program—and thus the 8(a) program in its entirety—as inconsistent with the Constitution. Because the courts below did not address that claim, because there is no division of appellate authority as to the proper analysis of such a claim, and because the facts indisputably show that petitioner lacks standing to assert such a claim in any event, further review is not warranted.

1. A plaintiff must make three showings to establish standing under Article III of the Constitution: (1) an "injury in fact," (2) a "causal connection between the injury and the conduct complained of," and (3) a likelihood, as opposed to mere speculation, "that the injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). As the party invoking federal jurisdiction, the plaintiff bears the burden of establishing standing to sue. *United States* v. *Hays*, 515 U.S. 737, 743 (1995).

The court of appeals correctly held that petitioner failed to bear this burden. The court read petitioner's constitutional claim as challenging only SBA's regulations, which use a race-based presumption to define which individuals are "socially disadvantaged" for purposes of entry into the 8(a) program. Pet. App. 2a, 3a-4a. The court then properly concluded that there was no link between that presumption and petitioner's inability to participate in the 8(a) program, since petitioner is ineligible for a race-neutral reason: Its owner is a multi-millionaire and thus cannot meet the prerequisite of being "economically disadvantaged." Since petitioner failed to establish a "causal

connection between [its] injury and the conduct complained of," *Lujan*, 504 U.S. at 560—and could not show that its injury would be redressed by a ruling requiring elimination of the race-conscious presumption it was challenging—the court of appeals' conclusion that petitioner lacks standing was manifestly correct.

2. Nonetheless, petitioner asserts that the court of appeals' analysis mischaracterizes the nature of its complaint. As noted, the Fourth Circuit—like the district court before it—read petitioner's claim as challenging solely the use, under SBA regulations, of a race-based presumption as a factor in 8(a) program eligibility determinations. In other words, the court of appeals understood petitioner's claim as a challenge to the manner in which SBA regulations identify who is "socially disadvantaged"—not as a more sweeping attack on the statute that authorizes the 8(a) program or as a challenge to the 8(a) program as a whole.

Petitioner now claims, however, that it is not challenging the race-conscious criteria in SBA regulations. Instead, petitioner appears to claim that it is challenging the statute that authorizes the 8(a) program—and SBA's reservation of contracts for disadvantaged persons under the program—as racially motivated and unconstitutional entirely apart from the race-conscious criteria in SBA regulations. Under this new theory, petitioner asserts, petitioner can show injury because reserving the Pacific Missile Range Facility contract to 8(a)-qualified companies deprived petitioner "of an opportunity to compete for [the] federal contract" through an open bidding process. Pet. 8; Pet. 9 n.8 ("It is this denial of the *opportunity* [to compete] which causes the injury in fact."). The D.C. Circuit, petitioner asserts, has held

that a plaintiff challenging the 8(a) program as a whole on such grounds has standing if (among other things) it can show that it would have been "ready, willing and able to compete for the contract" but for the contract's being set aside under the 8(a) program. Pet. 8-10 & n.8 (citing *Dynalantic Corp.* v. *Department of Defense*, 115 F.3d 1012 (D.C. Cir. 1997)).

To the extent petitioner contends that both the court of appeals and the district court misinterpreted the nature of its equal protection challenge, that case-specific issue lacks sufficient general importance to warrant review by this Court. Indeed, if petitioner believed that the court of appeals had misunderstood the scope of its constitutional claim, petitioner could have raised that issue in the petition for rehearing that it filed in the court of appeals. Yet the rehearing petition never alleged that the court of appeals had misconstrued petitioner's constitutional claim.[1]

Petitioner thus does not directly dispute that the court of appeals correctly resolved the more limited question that the court reasonably understood petitioner to have presented to it. Petitioner instead asks this Court to decide a question that neither the district court nor the court of appeals addressed—whether petitioner would have standing to challenge the constitutionality of the statute authorizing the 8(a) program (and the use of an 8(a) program at all) independent of the racial presumption contained in

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[1] This case thus stands in sharp contrast to *Dynalantic*, upon which petitioner relies. In that case, the plaintiff sought leave to amend its pleadings while on appeal to clarify that it was challenging the entirety of the 8(a) program as unconstitutional. See 115 F.3d at 1015.

SBA regulations. That question should not be addressed by this Court in the first instance. Accordingly, further review of the decision below is neither warranted nor appropriate. See, *e.g.*, *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *DeShaney* v. *Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 195 & n.2 (1989); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984).

In any event, petitioner's claim is without merit. Relying on the D.C. Circuit's decision in *Dynalantic*, petitioner asserts that a plaintiff challenging the 8(a) program as a whole—unlike a plaintiff challenging just the race-conscious regulations promulgated thereunder—has standing to sue if (among other things) the plaintiff can show that it would be "ready, willing and able to compete for the contract" if the contract had not been reserved for the socially and economically disadvantaged under the 8(a) program. See Pet. 9 n.8 ("the true test" for standing "is whether [the complainant] is ready, willing and able to compete for the contract").[2] Petitioner thus claims that his injury was the inability to compete for the contract, that the injury was caused by the existence of the 8(a) program, and that the injury would be redressed by a finding of unconstitutionality and the program's consequent elimination. See Pet. 8-9.

Petitioner, however, lacks standing even under that theory, because petitioner is not "ready, willing and

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[2] See also *Dynalantic*, 115 F.3d at 1016 (plaintiff has standing if it would be "able and ready to bid on [the] contracts"); *id.* at 1017-1018 (plaintiff able to show that it "would be able to compete immediately on equal footing" and is "ready, willing, and able to bid" for the contracts).

able to compete for the contract" in any event. Affirming the dismissal of petitioner's non-constitutional challenges, the court of appeals explained that, "even assuming that the government would open the [Pacific Missile Range Facility] contract" to competition if petitioner were to prevail, petitioner "would still lack standing." Pet. App. 4a. The court observed:

> [Petitioner's] contract with TRW prohibits [petitioner] from entering into other contracts which involve tasks that are directly related to work that [petitioner] has performed under the TRW subcontract unless TRW grants a waiver. If the contract were open to competitive bidding, it is not certain that such a waiver would be forthcoming, as TRW might well desire to bid on the contract itself. Since [petitioner's] ability to compete for the [Pacific Missile Range Facility] contract in this situation would depend on the "independent action of some third party not before the court," [petitioner] cannot establish standing.

Ibid. (quoting *Lujan*, 504 U.S. at 560).

The same analysis applies to petitioner's constitutional claims. Petitioner cannot claim that the 8(a) program *caused* its injury by preventing it from competing, because petitioner's TRW contract would preclude petitioner from competing even if the 8(a) program were struck down and the Pacific Missile Range Facility contract were put out for public bid. Nor can petitioner claim that success on the merits would *redress* its injury, since petitioner would remain ineligible to compete for the contract even if a

court were to strike down the 8(a) program at petitioner's behest.[3]

3. For these reasons, there is no conflict between the decision below and the D.C. Circuit's decision in *Dynalantic*, 115 F.3d at 1105. In *Dynalantic*, the D.C. Circuit held that Dynalantic Corporation had standing to raise an equal protection challenge to the government's decision to place certain contracts in the 8(a) program even though Dynalantic's ineligibility for the 8(a) program had nothing to do with race. *Id.* at 1015-1018. The court so concluded, however, because it understood Dynalantic to challenge the statute authorizing the 8(a) program—and thus the 8(a) program in its entirety—rather than merely the race-conscious criteria used by SBA regulations to determine eligibility for the program. *Id.* at 1015-1016; see also *id.* at 1019-1020 (Edwards, C.J., dissenting) (disagreeing with result because statute on which 8(a) program is founded does not even mention race and is clearly constitutional). Hence, the D.C. Circuit held that if the plaintiff were to prevail and the 8(a) program were eliminated in its entirety as unconstitutional, the contracts would be put out for bid and the plaintiff would be able to compete for them; the plaintiff's injury would thus be redressed. *Id.* at 1018.

Nothing in the Fourth Circuit's decision suggests disagreement with the D.C. Circuit's analysis of when a plaintiff has standing to challenge the con-

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[3] The speculative possibility that TRW might waive the clause is not sufficient to overcome petitioner's inability to show that its injury is redressable. See *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-46 (1976); *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 618 (1973).

stitutionality of the statute authorizing the 8(a) program. It simply did not understand petitioner to be making that sort of challenge. Similarly, nothing in the D.C. Circuit's opinion in *Dynalantic* suggests that if the plaintiff there had challenged only SBA's race-conscious regulations under the 8(a) program and not the statute itself, the D.C. Circuit would have reached a different result from that reached by the Fourth Circuit here. To the contrary, the D.C. Circuit was careful to distinguish the case of a claimant challenging only the regulations that prevented participation in the 8(a) program. See 115 F.3d at 1016 (emphasizing that the plaintiff there "has no desire to participate in the 8(a) program"); *ibid.* ("whether it could meet the non-race-conscious requirements" of 8(a) is relevant only if the plaintiff "seek[s] to qualify for the 8(a) program"). Because there is no conflict between the Fourth Circuit's unpublished opinion below and the D.C. Circuit's decision in *Dynalantic*, no further review is warranted.

4. Even if there were tension between *Dynalantic* and the court of appeals' decision below, this case would not be an appropriate vehicle to address it.

First, petitioner lacks standing to challenge the use of a racial criterion in the program because it "is an intended beneficiary, not a victim, of the racial classification it challenges." Pet. App. 9a. The 8(a) program is designed to assist socially disadvantaged individuals, and petitioner—because its owner is from India—is presumed to be "socially disadvantaged" under SBA rules. Indeed, that race-conscious presumption previously enabled petitioner to receive a government contract under DoD's Small Disadvantaged Business (SDB) program (*id.* at 9a-10a), which

employs the same presumption.[4] Thus, the alleged flaw in the program on which petitioner bases its challenge—the program's race-consciousness—inures to petitioner's benefit.[5]

Second, petitioner lacks standing under any conceivable standing test, including the "ready, willing and able" test petitioner itself proposes (Pet. 9 n.8), and attributes to the D.C. Circuit (Pet. 9-10). As explained above (pp. 11-12, *supra*), petitioner cannot claim that the program caused its injury (the lack of an opportunity to compete) or that eliminating the program as unconstitutional would redress that injury because the terms of petitioner's TRW contract render petitioner ineligible to compete for the Pacific Missile Range Facility contract independent of the 8(a) program and regardless of how petitioner's constitutional claims might be resolved by the courts.

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[4] 13 C.F.R. 124.105(b), 124.602(*l*). See *SRS Technologies* v. *United States*, 894 F. Supp. 8, 10 n.2 (D.D.C. 1995); *SRS Technologies* v. *United States*, 843 F. Supp. 740, 741 (D.D.C. 1994).

[5] Petitioner does not allege that the government treats persons of Indian ancestry less favorably than other individuals in awarding 8(a) contracts. SBA's presumption gives the same advantage to natives of India as it does to individuals, such as HTS's owner, who are of Philippine ancestry. See 13 C.F.R. 124.105(b).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 97-564

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1997

SRS TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED STATES DEPARTMENT OF DEFENSE, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 15(6) of the Rules of the Supreme Court, Petitioner SRS Technologies, Inc. ("SRS")[1] addresses several new points raised by the Respondents in their Opposition to SRS's Petition for Writ of Certiorari (the "Opposition").

SRS's petition concerns SRS Technologies, Inc. v. U.S. Dep't of Defense, No. 96-1484, slip op. (4th Cir. May 6, 1997). In Section

[1] In accordance with S. Ct. R. 29(6), SRS states that it has no parent or subsidiary companies.

II of the Fourth Circuit's opinion, the relevant section, the court held that SRS lacked standing to challenge the constitutionality of an award of a federal contract without competition to a minority-owned concern replacing SRS, the incumbent, because SRS "was not prohibited from participating in the 8(a) Program for race-based reasons. Rather, SRS was ineligible to participate in the 8(a) Program because its owner is a multimillionaire whose net worth exceeded SBA's guidelines for economic disadvantage by several orders of magnitude." Pet. App. at 4a. Contrary to the Respondents' arguments, the Fourth Circuit did not hold that SRS lacked standing to raise the constitutional issues because SRS was a subcontractor, because it had a task order subcontract, because it had not submitted an actual written proposal to continue its work, or because it needed TRW's cooperation to submit such a proposal. Id.

SRS filed this Petition for Writ of Certiorari, citing Dynalantic Corp. v. Dep't of Defense, 115 F.3d 1012 (D.C. Cir. 1997). In Dynalantic, Dynalantic sued these same Respondents to enjoin another contract award under the same federal program, i.e., an 8(a) Program set-aside procurement of a flight simulator contract for which Dynalantic wished to compete. Dynalantic was not even the incumbent, as SRS was. Dynalantic asserted that it was denied an opportunity to compete for the contract because the 8(a) Program is a racial preference program that violates the U.S. Constitution. Dynalantic, like Petitioner SRS, could not claim to be

"economically disadvantaged" under the 8(a) Program, 15 U.S.C. § 631 et seq. (1994 and Supp. 1996) (the "Act"). The Respondents argued that Dynalantic lacked standing. The D.C. Circuit held that the Respondents' argument was:

> premised on a mischaracterization of Dynalantic's alleged injury. Appellant has no desire to participate in the 8(a) program. [Citation omitted]. Rather Dynalantic's injury is its lack of opportunity to compete for Defense Department contracts reserved to 8(a) firms.

Dynalantic, 115 F.3d at 1016 (emphasis added).

In their Opposition, the Respondents concede the central issue in the Petition, i.e., that there is now a conflict between the circuit courts on the important issue of who may challenge the constitutionality of a federal racial preference program. In a vain effort to avoid the implication of their concession, Respondents now claim that SRS challenged the Act's implementing regulations, but not the Act. The Respondents are incorrect, as the record and the Fourth Circuit's opinion demonstrate.

SRS's Complaint expressly stated that the district court had jurisdiction pursuant to 28 U.S.C. § 1331 (1988) because the action "arises under the Constitution and the laws of the United States, including but not limited to the Fifth and Fourteenth Amendments to the

Constitution; 10 U.S.C. § 2323 (1994); Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1994)" (emphasis added); see also Brief for Plaintiff-Appellant SRS Technologies, Inc. to the Fourth Circuit ("Appellant's Brief") at 3.[2] In its Complaint, SRS sought to "enjoin Defendant the U.S. Department of Defense ('DoD') from permitting performance of a Government contract based on the alleged economic and racial disadvantage for the prospective contract, in violation of the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution."

SRS's Appellant's Brief also stated that it was challenging the statute and its implementing regulations, as the following exerpts from Appellant's Brief demonstrate:

- "DoD's actions are the result of a racial preference scheme . . . . The primary statutory source of this racial preference is Section 8(a) of the Small Business Act, which authorizes the SBA to enter into 'contracts' with other government departments and agencies, and to subcontract the performance of these contracts to 'small business concern[s] owned and controlled by socially and economically disadvantaged individuals . . . .'

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[2] The Complaint and all briefs submitted to the courts below that are referenced herein have been lodged with this Court.

15 U.S.C. § 637(a)(1)(c) (1994)." Appellant's Brief at 4 (emphasis added).

- "The SBA Act, the DoD quota law, and their implementing regulations create a requirement-in-fact, not readily susceptible of waiver, consideration of merit, or determination of actual need." Id. at 6 (emphasis added).

- "SRS brought this action against DoD and SBA to declare unconstitutional and to overturn this racial preference scheme." Id. at 9.

- "For ease of reference in this brief, the set-aside and racial goals contained in 10 U.S.C. §§ 2323(a) and (e), the Small Business Act, and regulations implementing these laws, are called, collectively, 'the DoD set-aside scheme.'" Id. at 9 n.3 (emphasis added).[3]

The error of Respondents' claim is further evidenced by their own submissions to the Court of Appeals. For example, the Respondents relied on the erroneous lower court decision in Dynalantic, 937 F. Supp. 1 (D.D.C. 1996), in support of their argument to

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[3] Both lower court decisions recognized that SRS is challenging the constitutionality of the 8(a) Program, without limiting this to its statute or its regulations. Pet. App. at 3a & 7a-9a.

the Court of Appeals for the Fourth Circuit that contractors lack standing to raise an equal protection challenge to the 8(a) Program if they are ineligible for the program for any reason other than the Government's alleged use of race-based criteria. Indeed, the Respondents attached a copy of that decision as Exhibit A to their brief in the Fourth Circuit.[4]

In addition, in their Consolidated Brief for the Appellees to the Fourth Circuit ("Appellees' Brief"), the Respondents repeatedly asserted that SRS was challenging the entire 8(a) Program, and not just regulations, e.g.:

- "SRS raises an equal protection challenge to the 8(a) program, specifically attaching a rebuttable presumption that certain racial minorities are 'socially disadvantaged' for purposes of participating in the program." Appellees' Brief at 17-18;

- "SRS argues that the 8(a) program unlawfully discriminates on the basis of race in violation of the equal

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[4] The Respondents concede that the district court's Dynalantic opinion, having been reversed, is no longer applicable. The fact remains that the Respondents relied on it in the Fourth Circuit in connection with SRS's challenge of the 8(a) Program.

protection guarantees of the Fifth and Fourteenth Amendments (Br. 4-8, 17-33)." Id. at 22.

- "In conclusion, SRS lacks standing to challenge the 8(a) program under the Equal Protection Clause . . . ." Id. at 30.

Likewise, in the Defendants' Memorandum in Support of HTS's Motion to Dismiss and in Opposition to SRS's Motion for Summary Judgment ("Opposition to Motion"), the Respondents stated, "SRS Technologies, Inc.'s (SRS's) complaint in this action is limited to the defendants' decision to award a support contract, pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), at the Pacific Missile Range Facility (PMRF), to High Technology Solutions, Inc. (HTS)." Opposition to Motion at 1. These excerpts, too, demostrate that the Respondents' claim that SRS challenged only regulations is groundless.[5]

The Opposition also argues a point that was not the basis of the Fourth Circuit's holding

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[5] Equally groundless and incomprehensible is Respondents' claim that "petitioner does not dispute" that it lacks standing to challenge the use of a race-based presumption, in SBA regulations, to determine social disadvantage. Opp. at 7. Unable to come to grips with the central issue in the case, the Respondents frivolously claim that SRS has conceded the issue.

concerning SRS's standing to raise SRS's constitutional challenge -- that SRS lacks standing because SRS was not "ready, willing and able" to compete for the contract at issue.[6] Specifically, the Respondents argue that the terms of SRS's subcontract with TRW somehow render SRS ineligible to compete for the contract. That argument is flawed. First, it speculates about the outcome of events that never occurred, i.e., whether TRW would have blocked SRS from competition when TRW had no motive to do so. Second, it assumes facts contrary to those set forth in SRS's complaint, which are taken as true for purposes of ruling on a motion to dismiss.

The issue of whether SRS was "likely" to receive a contract was not addressed by the Fourth Circuit in its SRS Technologies decision in connection with SRS's constitutional claims. As noted in the Petition, the district court improperly addressed that argument in the context of a motion to dismiss, and ruled that SRS's chance of obtaining a contract was remote, without considering that SRS was the incumbent. As the D.C. Circuit correctly held in Dynalantic, the true test is whether the contractor is denied the opportunity to compete because of a discriminatory policy. Denial of that opportunity causes injury-in-fact. Whether the contractor would "likely" win the award is

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[6] The Fourth Circuit addressed this issue in another section of its decision, not the section concerning SRS's standing to raise its constitutional challenge.

irrelevant to the issue of injury-in-fact and, hence, standing.

CONCLUSION

In both Dynalantic and the present case, a Plaintiff asserted that it was denied an opportunity to compete for a contract because of the same racial preference program in violation of the U.S. Constitution. The D.C. Circuit, in Dynalantic, held the plaintiff had standing to raise such a constitutional challenge. The Fourth Circuit in this case, held the plaintiff, Petitioner, SRS, lacked standing to raise such a constitutional challenge. The Circuits therefore are split as to this issue. This Court should grant certiorari to resolve the conflict concerning standing of a non-Section 8(a) company to challenge the constitutionality of an award of a federal contract without competition to a Section 8(a) company.

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